

IN THE SUPREME COURT OF MISSOURI

SC 92564

VICTOR ALLRED,
Respondent/Cross-Appellant,

v.

ROBIN CARNAHAN,
Respondent,

and

THOMAS SCHWEICH,
Appellant/Cross-Respondent,

and

MISSOURI JOBS WITH JUSTICE
Respondent/Cross-Appellant

On Appeal from the Circuit Court of Cole County
Honorable Jon E. Beetem

OPENING BRIEF BY INTERVENOR/RESPONDENT/
CROSS-APPELLANT MISSOURI JOBS WITH JUSTICE

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JURISDICTIONAL STATEMENT

Defendant State Auditor Thomas Schweich appeals and Intervenor Missouri Jobs with Justice cross-appeals from the May 18, 2012 Final Judgment of the Cole County Circuit Court in favor of Plaintiff Victor Allred on Count IV of Plaintiff's First Amended Petition, finding that §116.175, R.S.Mo., is unconstitutional and vacating the Auditor's fiscal note for that reason. Questions regarding the constitutionality of a statute are within the exclusive jurisdiction of this Court. Mo. Const. Art. V, §3.

Plaintiff Victor Allred cross-appeals from the Circuit Court's Judgment in favor of Defendant Secretary of State Robin Carnahan on Count I of the First Amended Petition, upholding the fairness and sufficiency of the Secretary of State's summary statement. Plaintiff also cross-appeals from the Circuit Court's Judgment in favor of Defendant Schweich on Counts II and III of the First Amended Petition, upholding the fairness and sufficiency of the Auditor's fiscal note and fiscal note summary, respectively. Because this Court has exclusive jurisdiction over the constitutional challenge, it also has jurisdiction to decide all other issues in the case. *State ex rel. Union Electric v. Public Service Commission*, 687 S.W.2d 162, 165 (Mo. banc 1985).

STATEMENT OF FACTS

A. Parties

Plaintiff Victor Allred is a citizen of the State of Missouri, a restaurant owner, and employer of tipped employees. (L.F. at 118; Jt. Stip., ¶1, see Intvr's App. at A-035.)¹ Defendant Robin Carnahan is the Secretary of State of Missouri, and Defendant Thomas Schweich is the Auditor. (L.F. at 118, 191-192; Jt. Stip. ¶ 2-3, see Intvr's App. at A-035.) Intervenor Missouri Jobs with Justice is a Missouri nonprofit corporation and a proponent of the initiative petitions 2012-84 and 2012-85 that are at issue in this case. (Jt. Stip., ¶4, see Intvr's App. at A-035.)

B. Initiative Petitions 2012-84 and 2012-85

On October 4, 2011, counsel for Missouri Jobs with Justice, Mr. Chris Grant, submitted sample sheets for the two petitions (Version 1 [2012-84] and Version 2 [2012-85]) to the Secretary of State, proposing amendments to Missouri's Minimum Wage Law, Chapter 290, R.S.Mo. (Jt. Stip., ¶8 and Jt. Exs. 1 and 2, see Intvr's App. at A-035-036 and A-044-056.) Mr. Grant also arranged for the submission of a proposed fiscal impact

¹ Intervenor will use the initials "L.F." to refer to the Legal File, the initials "Tr." to refer to the transcript of the trial, and the phrase "Jt. Stip." to refer to the Parties' Joint Stipulation of Facts. The Joint Stipulation and Joint Exhibits 1-9 attached to it (hereafter "Jt. Ex.") are contained in Intervenor's Appendix at A-034 through A-120. Hereafter, Intervenor's Appendix is referred to as "Intvr's App."

statement for the petitions to the Auditor's Office. (Jt. Stip., ¶8 and Jt. Ex. 7, see Intvr's App. at A-035-036 and A-087-A110.)

Both versions of the initiative petition seek to increase the state minimum wage to \$8.25 per hour and the minimum wage for employees who work for tips to 60% of the minimum wage. (L.F. at 25-34; Jt. Exs. 1 and 2, see Intvr's App. at A-044-056.) Version 1 also clarifies that, if the federal minimum wage is increased above the state minimum wage then in effect under the proposed law, the higher federal minimum wage shall become the minimum wage rate in effect under the law. (Jt. Ex. 1, at 000076, see Intvr's App. at A-049.)

C. The Drafting of the Summary Statements, Fiscal Notes, and Fiscal Note Summaries.

The Secretary of State timely prepared summary statements for each of the initiative petitions. (L.F. at 37-38, 120, 192.) The Summary Statement for both Petitions states:

Shall Missouri law be amended to:

- increase the state minimum wage to \$8.25 per hour, or to the federal minimum wage if that is higher, and adjust the state wage annually based upon changes in the Consumer Price Index;
- increase the minimum wage for employees who receive tips to 60% of the state minimum wage; and

- modify certain other provisions of the minimum wage law including the retail or service businesses exemption and penalties for paying employees less than the minimum wage?

(L.F. at 75-78; Jt. Stip., ¶ 13-15, see Intvr's App. at A-036-037.)

The Secretary of State forwarded the initiative petitions to the State Auditor's Office on October 5, 2011. (Tr. at 36; Jt. Exs. 1 & 2, see Intrv's App. at A-045 & A-051.) The Auditor's Office had 20 days from receipt of the petitions to complete fiscal notes and fiscal note summaries. (Tr. at 36, 81.)

Jon Halwes, a CPA and 27 year employee in the Auditor's Office, prepared the fiscal notes and fiscal note summaries for the petitions. (Tr. at 35, 77.) He has prepared all fiscal notes and summaries (60-70 of them) for initiatives since November 2010. (Tr. at 29, 79-80.) Prior to working on fiscal notes, Mr. Halwes conducted audits of government entities. (Tr. at 77.) He testified that the same types of skills in budgeting, research, and data analysis are utilized in the audit process and in the preparation of fiscal notes. (Tr. at 78-79.)

The practices and procedures Mr. Halwes followed in this case are the same that the Auditor's Office follows in preparing all fiscal notes and fiscal note summaries. (Jt. Stip., ¶¶19-23, see Intvr's App. at A-038-039.) After receiving the initiative petitions from the Secretary of State on October 5, 2011, Mr. Halwes contacted a cross-section of fifty different governmental entities, including state governmental agencies, local entities, and political subdivisions, and requested their input on the estimated cost or savings from

the measures. (Tr. 80-81; L.F. at 44, 58; Jt. Ex. 3 at 000059, see Intrv's App. at A-058; Jt. Ex. 4 at 000061, see Intrv's App. at A-072.) Twenty-eight of the fifty entities responded. (L.F. at 45-48, 59-62; Jt. Ex. 3 at 00060-00063, see Intrv's App. at A-059 - A-062; Jt. Ex. 4 at 00062-00065, see Intrv's App. at A073-076.) Missouri Jobs with Justice, proponent of the petitions, submitted a proposed statement of fiscal impact to the Auditor's Office on October 20, prior to the deadline for completion of the fiscal notes and summaries. (Tr. at 37; Jt. Stip., ¶8 and Jt. Exs. 7 & 8, see Intrv's App. at A-035-036 & A-087-110.) Although Plaintiff Allred was aware of the minimum wage initiative petitions no later than October 6, 2011, he failed to submit a proposed fiscal impact statement to the Auditor in opposition to the petitions prior to the deadline for completion of the fiscal notes and summaries despite the opportunity to do so. (Tr. at 106, 183-184.)

Mr. Halwes reviewed the submissions from government entities and Missouri Jobs with Justice for completeness and reasonableness, making sure that each entity's response conveyed a complete representation of what the entity intended to send and was reasonably related to the proposed amendment. (Tr. at 48, 82-84, 92.) He checked the numbers in the submission from Missouri Jobs with Justice against the data sources cited in it and replicated some of the calculations. (Tr. at 45-48, 92.) He then prepared the fiscal notes using the information received from the state and local respondents and from Missouri Jobs with Justice. (Tr. at 80-90.) He included the responses from governmental entities and Missouri Jobs with Justice in the fiscal note almost verbatim. (Tr. at 31, 87.) He did not independently review the assumptions underlying the submissions, because

that could take days or weeks that he did not have. (Tr. at 122.) He did not extrapolate from the conclusions of the few local government entities that responded to his request, because he could not assume that other local entities would have had similar responses. (Tr. at 68-69, 116.)

After completing the fiscal notes, Mr. Halwes prepared fiscal note summaries, based upon the reasonableness of the number in the submissions, that he believed would be relevant to voters. (Tr. at 72-73, 90-94.) The fiscal note summary for both Petitions states:

Increased state and local government wage and benefit costs resulting from this proposal will exceed \$1 million annually. State government income and sales tax revenue could increase by an estimated \$14.4 million annually; however, business employment decisions will impact any potential change in revenue. Local government revenue will change by an unknown amount.

(L.F. at 43, 57; Jt. Stip., ¶16, see Intrv's App. at A-037.)

The Auditor's Office sent the completed fiscal notes and fiscal note summaries to the Attorney General on October 25, 2011. (L.F. at 43-70; Jt. Ex. 3 & 4, see Intrv's App at A-057 & A-071.) The Attorney General certified them as to legal content and form. (L.F. at 71-74.) On November 8, 2011, the Secretary of State certified the official ballot titles for the petitions, incorporating her summary statements and the fiscal note summaries. (L.F. at 75-78, 120-121, 193; Jt. Ex. 5 & 6, see Intrv's App. at A-085-086.)

D. Lawsuit Challenging Ballot Title

On November 17, 2011, Plaintiff filed this suit in Cole County against Secretary of State Carnahan and Auditor Schweich, claiming that the summary statements, fiscal notes, and fiscal note summaries for the minimum wage initiative petitions are insufficient and unfair. (L.F. at 8-24.) Missouri Jobs with Justice promptly moved to intervene, and its motion was denied. (L.F. at 5, 7.) Missouri Jobs with Justice appealed. The Missouri Court of Appeals reversed with instructions to grant intervention as of right. *Allred v. Carnahan*, WD74870 (Mo. Ct. App. W.D., April 2, 2012).

On April 9, 2012, Plaintiff sought leave to amend his Petition to add a Count IV, challenging the constitutionality of §116.175, R.S.Mo., which requires the Auditor to prepare fiscal notes and fiscal note summaries for initiative petitions. The motion was granted over the objections of the Auditor and Intervenor on May 1, 2012, at trial. (Tr. at 8-9).

Following remand, Plaintiff, Secretary of State Carnahan, and Intervenor filed cross-motions for judgment on the pleadings on Count I of the Petition. (L.F. at 106-112, 139-172). The Court heard argument on the issue, and by Order dated April 25, 2012 upheld the fairness and sufficiency of the summary statement, granted the motions filed by Defendant Carnahan and Intervenor, and denied Plaintiff's motion on Count I. (L.F. at 173-180.)

A bench trial was held on May 1, 2012. (L.F. at 4-5, 209.) The Court heard argument on Plaintiff's claim that §116.175 is unconstitutional. It then took evidence on

the fiscal note and fiscal note summaries for the initiative petitions and took the matter under advisement. (L.F. at 4.)

E. Judgment of the Circuit Court

On May 18, 2012, the Court issued its decision rejecting Plaintiff's challenge to the fairness and sufficiency of the fiscal notes and fiscal note summaries, and entering Judgment for the Auditor on Counts II and III of the First Amended Petition. (L.F. at 320-343, 348.) Pursuant to its Order of April 25, the Court entered Judgment for the Secretary of State on Count I of the First Amended Petition. (L.F. at 348.)

However, the Court granted Judgment for Plaintiff on Count IV, on the basis that §116.175 expands the powers of the Auditor beyond those authorized by Article IV, §13 of the Missouri Constitution. (L.F. at 343-348.) Following its recent decision in *Brown v. Carnahan*, Case No. 12AC-CC00077 (Cole County Circuit Court, February 28, 2012), the trial court held that estimating the fiscal impact of a proposed measure or "forecasting what might happen" does not "relate to" the "supervising and auditing of the receipt and expenditure of public funds," as allowed by Article IV, §13. (L.F. at 346-347.) The trial court also found that the Auditor's investigation in this case was not a "true investigation," because the Auditor's Office simply pasted voluntary responses into the fiscal note and did not make any follow-up inquiry to responders. (L.F. at 347-348.) The trial court characterized this work as "quasi-clerical." (L.F. at 344, 346.) Because it was not an investigation, as allowed under Article IV, §13, the trial court held the Auditor had no power to undertake that work. (L.F. at 344-346.) The Court ordered that the

Auditor's fiscal notes and fiscal note summaries for the minimum wage initiative petitions "are hereby vacated and may not be included in the official ballot." (L.F. at 347-348.)

POINTS RELIED ON

The Trial Court erred as a matter of law by entering judgment for Plaintiff on Count IV of the First Amended Petition, because §116.175, R.S.Mo., requiring the Auditor to assess the fiscal impact of an initiative and to a prepare fiscal note and fiscal note summary, is constitutional, in that:

A. Article IV, §13 of the Missouri Constitution expressly authorizes the Auditor to “make all other. . . investigations required by law,” which are “related to the supervising and auditing of the receipt and expenditure of public funds,” and the preparation of fiscal notes and fiscal note summaries entails an “investigation” into the anticipated receipt and expenditure of public funds; and

Mo. Const. Article III, §49

Mo. Const. Article IV, §13

§116.175, R.S.Mo.

Board of Education of the City of St. Louis v. Missouri State Board of

Education, 271 S.W.3d 1 (Mo. banc 2008)

State ex rel. Martin v. Independence, 518 S.W.2d 63 (Mo. 1971)

Farmer v. Kinder, 89 S.W.3d 447 (Mo. 2002)

Missouri Municipal League v. Carnahan (MML I), 303 S.W.3d 573 (Mo.

App. W.D. 2010)

B. Article IV, §13 gives the Auditor the power to assess the fiscal impact of a proposed measure as a matter of law, and the constitutionality of §116.175 does not turn on the facts of the particular case as to whether the Auditor engaged in a “true investigation” versus an “investigation.”

Mo. Const. Article III, §49

Mo. Const. Article IV, §13

§116.175, R.S.Mo.

United Labor Committee v. Kirkpatrick, 572 S.W.2d 449 (Mo. banc 1978)

Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824

(Mo. banc 1990)

Missouri Municipal League v. Carnahan (MML I), 303 S.W.3d 573 (Mo.

App. W.D. 2010)

SUMMARY OF THE ARGUMENT

The trial court erred in finding that §116.175, R.S.Mo. violates Article IV, §13 of the Missouri Constitution. Section 116.175 requires the Auditor to “assess the fiscal impact” of a proposed ballot measure and to draft a fiscal note and fiscal note summary stating the “measure’s estimated cost or savings, if any, to state or local governmental entities.” Article IV, §13 authorizes the Auditor to “make . . . investigations required by law,” provided they are “related to the supervising and auditing of the receipt and expenditure of public funds.” The preparation of fiscal notes and fiscal note summaries by definition entails an “investigation” into the anticipated future “receipt and expenditure of public funds” and falls within the Auditor’s constitutional duties.

The trial court’s overly restrictive reading of Article IV, §13, limiting the Auditor’s powers to the review of past receipts and expenditures, violates the well-recognized axiom that Constitutional provisions are to be construed broadly because of their “permanent character.” *State ex rel. Martin v. Independence*, 518 S.W.2d 63, 65 (Mo. 1971). The trial court also failed to give “due regard” to the “primary objects” of Article IV, §13, and failed to construe all parts of this constitutional provision in harmony with each other. *Id.* at 66.

Article IV, §13 empowers the Auditor to conduct both “audits” and “investigations.” Each term has its own meaning. “Audits” by their nature are backward looking, but “investigations” are not inherently retrospective. Any doubt as to whether the Auditor is constitutionally permitted to estimate future revenues and expenditures is

removed by the requirement in Article IV, §13 that the Auditor “supervise” the “budgeting systems” of political subdivisions of the state. Budgeting by definition requires an estimation of future receipts and expenditures. All of the Auditor’s powers in Article IV, §13 relate to the receipt and expenditure of public funds at some point in time. The fiscal note statute, §116.175, R.S.Mo., falls squarely within these powers.

The trial court also erred by resting its *legal* construction of Article IV, §13 and §116.175 on its *factual* conclusion that the Auditor did not conduct a “true investigation” in this case. As a matter of law, the Auditor either has or does not have the power to assess the fiscal impact of proposed ballot measures and to prepare fiscal notes and fiscal note summaries. It is absurd to suggest that the meaning of Article IV, §13 and §116.175 fluctuates with the quality of the Auditor’s job performance. This Court has cautioned, in connection with challenges to the fairness and sufficiency of ballot titles, that, “When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course.” *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990). The Trial Court impermissibly allowed a partisan opponent’s critique of the Auditor’s methods and conclusions over policy debates in a particular case to determine its construction of the applicable Constitutional and statutory provisions.

ARGUMENT

Standard of Review

This Court will affirm the trial court's judgment on Count IV “unless there is no substantial evidence to support it, unless the decision is contrary to the weight of the evidence, or unless the trial court erroneously declares or applies the law.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Constitutional challenges to a statute are reviewed *de novo* by the Supreme Court. *Ocello v. Koster*, 354 S.W.3d 187, 197 (Mo. 2011). A statute is presumed valid and will not be “invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the Constitution.” *Board of Education of the City of St. Louis v. Missouri State Board of Education*, 271 S.W.3d 1, 7 (Mo. banc 2008).

The person challenging the statute’s constitutionality bears the burden of proving the statute clearly and undoubtedly violates the constitution. *F.R. v. St. Charles County Sheriff’s Dept.*, 301 S.W.3d 56, 61 (Mo. banc 2010). The Court will “resolve all doubt in favor of the act’s validity, and in doing so should make “every reasonable intendment to sustain the constitutionality of the statute.” *Westin Crown Plaza Hotel Co. v. King*, 664 S.W2d 2, 5 (Mo. banc 1984).

Point IA

The Trial Court erred as a matter of law by entering judgment for Plaintiff on Count IV of the First Amended Petition, because §116.175, R.S.Mo., requiring the Auditor to assess the fiscal impact of an initiative and to prepare a fiscal note and fiscal note summary, is constitutional, in that:

A. Article IV, §13 of the Missouri Constitution expressly authorizes the Auditor to “make all other. . . investigations required by law,” which are “related to the supervising and auditing of the receipt and expenditure of public funds,” and the preparation of fiscal notes and fiscal note summaries entails an “investigation” into the anticipated receipt and expenditure of public funds.

Under Article III, §49 of the Missouri Constitution, the people have reserved to themselves the power to enact laws by initiative petition. The purpose of this provision is to enable the people to bypass the General Assembly and enact policy objectives which their elected representatives, for any number of reasons, have not passed or will not pass. No other provision in “our constitution so closely models participatory democracy in its pure form.” *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827. Courts should therefore tread carefully in taking any action that may affect this right.

Statutes are presumed valid. Plaintiff bears the burden of proving that §116.175, R.S.Mo. “clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the Constitution.” *Board of Education of the City of St. Louis*, 271 S.W.3d at 7; *F.R. v. St. Charles County Sheriff’s Dept.*, 301 S.W.3d at 61. Constitutional provisions are to be construed even more broadly than statutory provisions because of their “more permanent character.” *State ex rel. Martin*, 518 S.W.2d at 65. “Of particular importance is the principle that in determining the meaning of a constitutional provision due regard will be given to its primary objects and all related provisions should be construed as a whole and where necessary to bring conflicts, if any, into harmony.” *Id.* at 66.

Plaintiff argued, and the Trial Court held, that §116.175 violates Article IV, §13 of the Constitution, in two separate and independent ways. First, the Court held that §116.175 requires the Auditor to predict future receipts and revenues, and the Constitution only permits him to review past receipts and revenues.² This holding is the

² Notably, Plaintiff does not argue that the requirement of a fiscal note is itself unconstitutional. He simply argues that the Auditor lacks the authority to draft a fiscal note and fiscal note summary. Plaintiff leaves open the questions of who does have authority to undertake these duties and whether the absence of a constitutionally valid fiscal note and summary prevents the initiatives in this case from being put to a vote.

focus of Point IA of this Brief. Second, the Court held that although the process used by the Auditor to prepare the fiscal notes and fiscal note summaries in this case and in *Missouri Municipal League v. Carnahan (MML I)*, 303 S.W.3d 573 (Mo. App. W.D. 2010), complies with the requirements of §116.175, it is not rigorous enough to qualify as an “investigation” as that term is used in Article IV, §13. This holding is the focus of Point IB of this Brief.

Article IV, §13 of the Missouri Constitution sets forth the duties of the State Auditor, as follows:

The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him be law which is not related to the supervising and auditing of the receipt and expenditure of public funds.

(emphasis supplied.)

By its plain language, Article IV, §13 empowers the Auditor to undertake multiple tasks. He may establish “accounting systems,” conduct “audits” and “post-audits,” make

“investigations” required by law, and supervise the “budgeting systems” of political subdivisions. This Court has previously looked to the dictionary to discern the “plain, ordinary meaning” of terms used in Article IV, §13 of the Constitution:

[A]n audit is a “methodological examination and review of a situation or condition (as within a business enterprise) concluding with a detailed report of findings.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 143 (1976). A post-audit is an "audit made subsequent to the final settlement of a transaction." *Id.* at 1771.

Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228, 232 (Mo. 1997).

The dictionary definitions of the Auditor’s other enumerated powers are as follows:

“Accounting” – “the system of recording and summarizing business and financial transactions and analyzing, verifying, and reporting the results”

“Investigate” - “to make a systematic examination; especially, to conduct an official inquiry”

“Budget” – “**a:** a statement of the financial position of an administration for a definite period of time based on *estimates* of expenditures during the period and *proposals* for financing them **b:** a *plan* for the coordination of resources and expenditures **c:** the amount of money that is available for, required for, or assigned to a particular purpose.” (emphasis added).

“System” -- “**1:a** a regularly interacting or interdependent group of items forming a unified whole; . . . **d** a group of devices or artificial objects or

an organization forming a network especially for distributing something or serving a common purpose; . . . **2:** an organized set of doctrines, ideas, or principles usually intended to explain the arrangement or working of a systematic whole;. . . **3:***a* an organized or established procedure.” *Id.*

Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary> (accessed on June 7, 2012.)

The last sentence of Article IV, §13, following the enumeration of the Auditor’s express powers, clarifies that the enumerated duties must relate to “supervising and auditing of the receipt and expenditure of public funds.” *Cf. Farmer v. Kinder*, 89 S.W.3d 447, 453 (Mo. 2002) (The “constitution enumerates very specific powers that the treasurer may exercise, and then specifically provides that no duty not related to those specifically enumerated powers may be exercised by her.”). The General Assembly may not, for example, require the Auditor to perform an investigation of election fraud, because it would not “relate to the receipt and expenditure of public funds.”

In *Farmer*, the court held that the State Treasurer could not sue the circuit court to collect unclaimed property, because Article IV, §15 of the Constitution only empowers the Treasurer to act as a “custodian” of funds (as defined by the dictionary), and not to collect them. 89 S.W.3d at 453. Here, in contrast, Article IV, §13 authorizes the Auditor to “make investigations required by law,” which are “related to the supervising and auditing of the receipt and expenditure of public funds;” and, Section 116.175, R.S.Mo., mandates exactly this type of investigation. Whereas in *Farmer* the Constitution did not

expressly give the Treasurer the power to take the action in question, here the Constitution expressly allows the Auditor to take the action at issue.

Section 116.175, R.S.Mo., requires the Auditor to “assess the fiscal impact” of an initiative petition and to prepare a fiscal note and fiscal note summary which shall “state the measure’s estimated cost or savings, if any, to state or local governmental entities.” To “assess” means to “determine the importance, size, or value of” something. Merriam-Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary> (accessed on June 7, 2012). The word “assess” as used in §116.175, R.S.Mo., is synonymous with “investigate” in Article IV, §13. The Auditor “assesses” a ballot measure by examining it and making inquiries about it – which is the dictionary definition of “investigating.” “Fiscal” means “of or relating to taxation, public revenues, or public debt”; “of or relating to financial matters.” *Id.* In short, the statute requires the Auditor to estimate the potential impact of an initiative on the revenues and expenditures of state and local governments.

The trial court held, as it previously did in *Brown v. Carnahan*, Case No. 12AC-CC00077, that the last sentence of Article IV, §13 restricts the Auditor to reviewing money *already received and spent*. Because the preparation of fiscal notes and summaries entails an estimation of future revenues and expenditures rather than a review of money already received and spent, the Court reasoned, it is not a “duty related to the supervising and auditing of the receipt and expenditure of funds.” (L.F. at 347.)

The trial court provided no legal authority for its conclusion that Article IV, §13 restricts the Auditor to reviewing money already received and spent. The last sentence of Article IV, §13 does not express this limitation. Nor does it forbid him from estimating future revenues and expenditures. It simply requires that all duties imposed on the Auditor be “related to the supervising and auditing of the receipt and expenditure of public funds.” Article IV, §13. Some of the enumerated powers of the Auditor set forth in §13 (post-audits of state agency accounts, audits of the state treasury) contemplate a retrospective review of monies already received or expended. Others, such as the power to “make. . . all other investigations required by law,” are silent with respect to time frame. Still others, such as the power to “supervise [the] budgeting systems” of political subdivisions, contemplate a prospective analysis of anticipated revenues and expenditures. Budgeting requires making estimates. *See* Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary> (accessed on June 7, 2012). Supervising budgeting systems entails overseeing how political subdivisions make estimates about future revenue and expenditures. If the trial court’s interpretation were correct, the Auditor could not supervise the “budgeting systems” used by political subdivisions, because such systems are inherently forward-looking. Courts are to harmonize Constitutional provisions that appear to conflict, rather than construe one provision in a way that renders the other meaningless. *State ex rel. Martin*, 518 S.W.2d at 65. The trial court’s overly restrictive reading of the last sentence of Article IV, § 13

renders other provisions meaningless, contrary to accepted rules of constitutional interpretation.

For the same reason, the Court should not limit the term “investigation” in Article IV, §13 to a review of past receipts and expenditures. Section 13 empowers the Auditor to conduct “audits,” “post-audits,” and “investigations.” The Constitution would not use different and separate terms if they all referred to a review and analysis of past receipts and expenditures. Each word has its own meaning, just as the phrase “supervising their budgeting systems” has its own meaning.

As used in Article IV, §13, “audits,” “post-audits,” “supervising [their] budgeting systems,” and “investigations” all entail the review – past, present, and future – of the receipt and expenditure of public funds. This is the “primary object” of Article IV, §13. *State ex rel. Martin*, 518 S.W.2d at 65 (“in determining the meaning of a constitutional provision due regard will be given to its primary objects”). The Auditor’s core functions are to track public revenues and expenditures. Other officers of the Executive Branch are not authorized to perform these functions. *Cf.* Mo. Const. Article IV, §2 (Governor to distribute and execute the laws and conserve the peace); Article IV, §14 (Secretary of State to authenticate and serve as custodian of records for the governor, and to perform duties as provided by law related to corporations and elections); Article IV, §15 (Treasurer to be custodian of all state funds); and Article IV, §22 (Director of Revenue to collect all taxes and fees payable to the State). Although the Joint Committee on Legislative Research is authorized to prepare fiscal notes for the General Assembly, this

Court has held that that it is constitutionally prohibited from doing so for initiatives, because the Committee is strictly “advisory to the General Assembly.” *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392, 395 (Mo. banc 1996). The staff of the Auditor’s Office is knowledgeable about budgeting, accounting, and forecasting regarding public funds. They use the same skills in drafting fiscal notes that they do in performing audits. (Tr. at 78.) They are uniquely qualified to assess how an initiative will affect receipts (in the form of any impact on tax revenues) or the expenditure of funds (in the form of costs to government). The General Assembly’s decision to give the Auditor the power to draft fiscal notes fits naturally with his other constitutionally duties.

Point IB

The Trial Court erred as a matter of law by entering judgment for Plaintiff on Count IV of the First Amended Petition, because §116.175, R.S.Mo., requiring the Auditor to prepare fiscal notes and fiscal note summaries for initiative petitions, is constitutional, in that:

B. Article IV, §13 gives the Auditor the power to assess the fiscal impact of a proposed measure as a matter of law, and the constitutionality of §116.175 does not turn on the facts of the particular case as to whether the Auditor engaged in a “true investigation” versus an “investigation.”

As an independent basis for its ruling on Count IV, the trial court held that the Auditor’s process for preparing the fiscal notes and summaries in this case was quasi-clerical, and was not the type of rigorous, independent investigation contemplated by Article IV, §13. As a result, the trial court concluded that §116.175, R.S.Mo. is unconstitutional. (L.F. at 344-348.)

This holding is strange for two reasons. First, it is inconsistent for the Court to uphold the fairness and sufficiency of the fiscal notes and summaries in Counts II and III of the lawsuit, but to find that the process by which they were prepared was so woefully deficient as to be unconstitutional. The Court of Appeals in *Missouri Municipal League (MML I)*, 303 S.W.3d 573, upheld the very processes utilized by the Auditor in this case as a statutory matter. Consistent with §116.175, the Auditor’s practice is to solicit

comments from a cross-section of state and local entities, and review them along with any submissions from proponents and opponents for reasonableness and completeness. The Court in *MML I* upheld the Auditor's practice of appending submissions almost verbatim to the fiscal note, and rejected the contention that he must conduct his own independent investigation. 303 S.W.3d at 582. Plaintiff tries to recast these same arguments in constitutional terms. However, neither he nor the trial court offers any legal support for the assertion that Article IV, §13 requires any "investigation" by the Auditor to meet a defined level of "rigor." Constitutional provisions are typically "broad and. . . not laden with procedural detail." *United Labor Committee v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. banc 1978). Procedural details are set forth in implementing statutes, and are enforceable as long as they do not unduly restrict the constitutional right. *Id.* at 454-455. Section 116.175, R.S.Mo., as interpreted by *MML I*, defines the type of investigation that is required for fiscal notes. Article IV, §13 does not require more, and §116.175, R.S.Mo., is consistent with the Constitution's broad grant to the Auditor to undertake investigations required by law.

Second, the trial court's reasoning confuses a question of constitutional interpretation with a question about the facts. The trial court held that §116.175, R.S.Mo. unconstitutionally delegates authority to the Auditor in violation of the limitations placed on his authority by Article IV, §13. This is a pure issue of law. A delegation claim is by definition a facial challenge to the constitutionality of a law that does not turn on the facts of a particular case. *Cf. Beatty v. State Tax Commission*, 912 S.W.2d 492, 495 (Mo.

1995) (“Where a party attacks the facial validity of a statute, a court may declare that statute unconstitutional only if there are no possible interpretations of the statute that conform to the requirements of the constitution.”) Section 13 either does or does not allow the Auditor to draft a fiscal note.

No one would dispute that the Constitution gives the Auditor the power to undertake audits. Whether his audits are good or bad is irrelevant to the constitutional question. It is equally absurd to say that the Auditor has the constitutional authority to conduct a rigorous, independent investigation, but he lacks the constitutional authority to conduct a quasi-clerical investigation. The quality of an investigation and resulting fiscal note in a particular case presents a question of statutory compliance, but it is irrelevant to the legal question whether the statute unconstitutionally delegates authority to the Auditor.

The trial court’s reliance on *Thompson*, 932 S.W.2d at 395, is misplaced. The question in that case was whether Article III, §35 of the Constitution permitted the General Assembly to assign to the Committee on Legislative Research the responsibility to draft a fiscal note for an initiative petition. The Court’s opinion turned on the phrase “advisory to the general assembly” as used in Article III, §35, not on the quality of the Committee’s fiscal note as a factual matter.

Accepting the trial court’s reasoning would require the Court to improperly intervene in the initiative process. If the constitutionality of §116.175 turns on the depth of the Auditor’s investigation in any particular case, then the Court must scrutinize and

independently judge the Auditor's process, the weight he gives to contrary policy positions from proponents and opponents, and his final conclusions in order to determine the threshold question of whether he exercised his constitutional power. The constitutional question would essentially be conflated with the fairness and sufficiency question.

"When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course." *Missourians to Protect the Initiative Process*, 799 S.W.2d at 827. "[The] court's role 'is not to act as a political arbiter between opposing viewpoints in the initiative process.'" *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006). Having the Court analyze whether an investigation is a "true" investigation, and second-guess the Auditor's conclusions on conflicting fiscal information, inserts the Court into an argument about the merits of a petition and forces it to pick sides in policy debates. This is a role reserved for the people and for elections. It is not the proper role of the Court in analyzing the Constitution and in initiative petition cases.

Lastly, even if the Court finds that §116.175 is unconstitutional, it should clarify that the trial court's Order vacating the fiscal note summary applies prospectively to the ballot, but does not invalidate signatures submitted prior to the May 6 deadline on petition sheets bearing the fiscal note summary. It would unduly frustrate the people's fundamental power of the initiative if the presence of an unconstitutional, void fiscal note

summary on petition sheets invalidated the signatures supporting the initiative. *See Missourians Against Human Cloning*, 190 S.W.3d at 463 (Smart, J., concurring in part and dissenting in part). The Constitution does not require a fiscal note or fiscal note summary. If §116.175 is unconstitutional, the fiscal note summaries in this case were void *ab initio*. Their inclusion on the petition sheets cannot undermine the constitutional right of the people to have the measure put to a vote. *Cf., Ocello v. Koster*, 354 S.W.3d 187 (Mo. 2011) (failure of joint committee on legislative research to draft fiscal note as required by statute does not void legislation where Constitution does not require a fiscal note); *United Labor Committee v. Kirkpatrick*, 572 S.W.2d 449, 454 (Mo. banc 1978) (refusing to invalidate demonstrably valid voter signatures based on notary's non-compliance with statute).

CONCLUSION

For the foregoing reasons, this Court should find that the Auditor has the authority under Article IV, §13 to assess the fiscal impact of a proposed measure and draft a fiscal note and fiscal note summary. The Court should reverse the trial court's judgment in Plaintiff's favor and enter Judgment for Auditor Schweich and Intervenor Missouri Jobs with Justice on Count IV of the First Amended Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that:

- (1) this brief contains the information required by Rule 55.03;
- (2) this brief complies with the limitations contained in Rule 84.06(b);
- (3) there are 7,264 words in this brief.

/s/ Christopher N. Grant
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 8th day of June, 2012, a true and correct copy of the Opening Brief of Intervenor/Respondent/Cross-Appellant Missouri Jobs with Justice was served by electronic mail on each of the following individuals:

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